

1963

State of Utah v. J. Herbert Hansen and Gertrude T. Hansen : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

FILED
JUN 28 1936

STATE OF UTAH, by and through its Clerk, Supreme Court, Utah
ROAD COMMISSION,

Plaintiff and Respondent,

vs.

J. HERBERT HANSEN and GER-
TRUDE T. HANSEN, his wife,
Defendants and Appellants.

Case No.

9679

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. Merrill C. Faux, Judge

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IN THE
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STATE OF UTAH

STATE OF UTAH, by and through its
ROAD COMMISSION,
Plaintiff and Respondent,

vs.

J. HERBERT HANSEN and GER-
TRUDE T. HANSEN, his wife,
Defendants and Appellants.

Case No.
9679

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This is an action brought by the respondent under and pursuant to the laws of eminent domain, to acquire the property of appellants for public highway utilization. Matters relating to the power of the respondent to condemn, public use and necessity of the highway project and the acquisition of appellants' properties therefor, and location of the facility in a manner consonant with the greatest public good and least private injury were admitted by appellants, and the case was thereupon tried as to the issues

of evaluation of the property to be expropriated and compensation to be paid therefor.

DISPOSITION OF CASE IN LOWER COURT

The Honorable Merrill C. Faux, District Judge, entered the judgment of the court, upon the general verdict returned by the jury of eight, against the respondent and in favor of the appellants in the sum of \$24,900.00, for interest and costs incurred.

From that judgment the appellants have lodged their appeal with this court.

STATEMENT OF FACTS

The statement appearing in appellants' brief on the facts raised at the trial is in most respects incomplete and to some extent, inaccurate. In order to place the entire case in its proper spectrum, respondent deems it advisable to recount the testimony and evidence adduced by the parties, respectively, as such affected the issues before the lower Court.

On the 19th day of September, 1960, the State of Utah, acting through its Road Commission, filed a complaint in the District Court for Salt Lake County to acquire, by eminent domain, property of the appellants, comprising 1.815 acre of land, said tract being more particularly described in the Second Amended Condemnation Resolution as Parcel No. 018-1:9:A (R. 1-4) (R. 86). Occupancy of the property, pendante lite, was thereafter assumed by the respondent

and the public work was carried forward (R. 6, 7). The property of appellant, situate in an industrial area of Salt Lake County (Tr. 306), abutted upon the north side of 21st South Street between 6th West Street and 7th West Street (See State's Ex. 1).

A reduced print of Exhibit 1 is attached to and made a part of this brief for illustrative purposes: the primary portion of the print is representative of the landowners' property by red coloring, improvements outlined in black thereon, the public right-of-way evidenced in brown shading, and the system of public streets, as utilized prior to the taking, is outlined in black.

The area expropriated by the State of Utah is set forth on the plastic overlay of the print in green color and the construction of the highway project, is graphically illustrated on the overlay as such relates to appellants' remaining property. The total tract of appellants prior to condemnation encompassed 18.06 acres, more or less, of which 0.026 acre was devoted to the existing highway along 21st South Street. The property of appellants, at the date of service of summons, served a wrecking and scrap metal yard and business was conducted under the style name of Sandy Metal Works (Tr. 39, 40, 66).

Prior to the filing of the complaint, 21st South Street supported east-west traffic, one 12 foot lane in each direction (Tr. 21, L. 20), the access at all points throughout the facility being uncontrolled; nor was there installed any traffic control devices, median strips, channel regulators, or electronic signals in front of appellants' property. Sixth

West Street, prior to the taking, did not intersect directly with 21st South Street (Tr. 20, 21, 22); rather, traffic proceeding south on 6th West reached the traveled segment of 21st South by following a service road which commenced at a point approximating the southeast corner of appellants' tract and ran thence westerly 365 feet, more or less, where the intersection with 21st South was consummated (see base print of attached exhibit).

21st South Street, as originally designed, was constructed to accommodate a traffic flow of 4,000 vehicles per day, 2,000 traffic units in each direction (Tr. 256, L. 2). At or about the date that the State of Utah filed its complaint, the facility, during a 14 hour period, was handling in excess of 16,000 motor vehicles (Tr. 251). Although the highway authority had not regulated the access from appellants' property to 21st South Street, the service road, or 6th West Street prior to September, 1960 (see Stipulation Tr. 31, 32), the landowners had constructed a seven foot chain link fence around the southern periphery of the parcel, ingress and egress being provided by a 16 foot opening on 21st South Street. Said point of access was approximately 300 feet from the southwest corner of the parcel as shown on the base exhibit (Tr. 27, 28).

The construction of the public improvement called for the following:

- a. Creation of a six-lane divided highway (3 lanes in each direction) each avenue approximating 12 feet in width (Tr. 124);

- b. Establishment of a raised-concrete median strip (16 feet in width) separating east-bound and west-bound traffic arteries (Tr. 25, 249);
- c. Projection of left-turn stall lanes (accommodating twelve vehicles) for traffic from both easterly and westerly directions on 21st South Street at the “plus” intersection formed by the service road and Roper Lane (Tr. 249) (see overlay);
- d. Reconstruction of the service road on property to be acquired in the eminent domain proceeding (see overlay, attached exhibit);
- e. Construction of highway shoulders on each side of 21st South Street eight feet wide (Tr. 25, 117);
- f. Establishment of controlled-access lines, regulating ingress and egress from appellants’ remaining tract to the 21st South facility, said limited access feature commencing at the southwest corner of the remaining property and continuing in an easterly direction 308.6 feet (see Stipulation, Tr. 31, 32, 33). The frontage included within the controlled-access line is delineated on the plastic overlay;
- g. The maintenance of a right-of-way line along the balance of appellants’ frontage on 21st South Street and the service road (the distance thereof being 575 feet, more or less) with access provided to the landowners at any point desired along said right-of-way line (see overlay, attached exhibit).

Appellants, by offer of proof endeavored to show that at the date of condemnation, a number of wrecked automobiles were located on the property acquired by the State of Utah; that the cost of removing the said vehicles and vehicle parts from the condemned area, together with the loss in value of the personal property, was \$16,500.00 (Tr.

212, 213, 214 and 215). The proffer was denied by the court (Tr. 215), the reasons therefor being announced (Tr. 7), and the trial proceeded on the questions of evaluation of the tract expropriated and the damage, less benefits, to the severed land remaining.

As mentioned herein, the State of Utah proposed to regulate and control access from a portion of appellants' remaining property to the public improvement (Tr. 29). In that regard, respondent asserted that such regulation was a proper and non-compensable function of the sovereign in its exercise of the police power (Tr. 5, 7, 114-117); the appellants contended that the controlled-access line constituted an unreasonable regulation in light of existing circumstances and such limitation on ingress and egress was, therefore, compensable (Tr. 115-120). Testimony was thereafter introduced on behalf of the State to prove the exigencies of the public for the development of a controlled-access highway on 21st South Street as it passes the properties of appellants. Mr. Holding, Deputy Highway Engineer of the State Road Commission, testified that the limited-access measures would be realized on 21st South Street from 3rd West Street, on the east, to Redwood Road, on the west (Tr. 126, 127, 145); that the viaduct overpassing the railroad trackage between 4th West and 6th West requires that traffic approaching appellants' property from the east negotiate a downgrade; and that in the witness's opinion, congested traffic on 21st South Street required some regulation of access to and from abutting properties in order to insure minimum standards of highway safety (Tr. 145).

Dale Burningham, Deputy Chief Research Engineer, testified that the public agency had conducted a series of studies relative to the need of controlled devices on 21st South Street (Tr. 241-249). That the facility was carrying in excess of four times its designed capacity (Tr. 251), that every intersection involved 16 points of conflict, with each additional access opening creating new points of conflict which produce increased traffic hazards (Tr. 262). Further, the witness stated that upon construction of the interstate highway facility (north-south freeway) at approximately 4th West Street, a cloverleaf interchange would be developed to serve 21st South Street traffic and that the construction of such thru-way and cloverleaf, in the opinion of the Department, would cause an even greater influx in average daily traffic on 21st South Street (Tr. 254). Testimony, further, was illustrative that the highway was designed to facilitate traffic up to speeds of 50 m.p.h. (Tr. 289) and that the regulation of access, as proposed along appellants' property, would eliminate internal stream friction of traffic movement and reduce the hazards and danger of accidents (Tr. 274, 280). The landowners did not place into evidence any testimony as to the relative needs for controlled access on 21st South Street as such pertained to public safety and traffic movement.

Appellants' evaluation witness, Mr. Kiepe, testified that the highest and best use of the area taken was dual, industrial and commercial (Tr. 103), and that, in his opinion, the value of the land acquired at the date of condemnation was \$13,000, severance damage \$40,700, or a total opinion of \$53,700.

After landowners rested their case in chief, the respondent went forward with the testimony of three evaluation witnesses, Edmund D. Cook, Augustus Johns and C. Francis Solomon. All evaluation witnesses for the State of Utah testified that the highest and best use of the subject property, at the date of condemnation, was industrial utilization (Tr. 306, 334, 360), the tract lying within an M-2 Industrial Zone of the municipality (Tr. 306). The specific evaluation estimates of the witnesses were, respectively, as follows:

a. Cook

1. Land and improvements taken\$20,570.00
2. Severance damage to remaining property 100.00
	<hr/>
3. Total opinion\$20,670.00

b. Johns

1. Value of land and improvements taken\$21,157.00
2. Severance damage to remaining property 1,308.00
	<hr/>
3. Total opinion\$22,465.00

c. Solomon

1. Value of land and improvements	..\$20,650.00
2. Damage to remaining property 3,400.00
	<hr/>
3. Total opinion\$24,050.00

With respect to the reasonableness of controlled-access, the Court, in addition to the submission of the general verdict form, propounded the following special interrogatory to the jury:

“We, the jury, find from a preponderance of the evidence in this case the following answer to the question propounded to us:

“Is the non-access limitation imposed upon the west portion of defendants’ land unreasonable?

“Answer:”

The panel of jurors on March 22, 1962, answered the above set forth interrogatory in the negative (R. 83). The jury, additionally, returned its general verdict in the following amount:

a.	Value of land and improvements taken by the State of Utah	\$21,500.00
b.	Damages to the property remaining ..	3,400.00
c.	Total verdict	<hr/> \$24,900.00

From the judgment entered upon the verdict, appellants have prosecuted this appeal.

ARGUMENT

POINT I.

THE LOWER COURT DID NOT ERR IN REFUSING TO CONSIDER EVIDENCE RELATIVE TO COSTS OF REMOVAL AND DAMAGE TO PERSONAL PROPERTY SITUATED ON THE CONDEMNED PARCEL AT THE DATE OF CONDEMNATION.

(a) Costs and damage incident to the removal and relocation of personal property is not a compensable element in an eminent domain proceeding.

Appellants, by this appeal, seek to overturn the decision of the lower Court wherein it was declared that costs and expenses incurred in removing chattels and other personal property from the expropriated tract and the damage incident to such removal are not compensable factors to be considered in a condemnation proceeding. Their brief in support of this point, at the same time, is void of any discussion respecting the established judicial precedent advocated by other courts passing on the issue.

The unquestioned weight of authority in the United States supports the proposition of law that removal and relocation costs of personalty from the condemned premises may not be recovered in eminent domain. Graphic of

this almost uniform pronouncement is the recent statement of the Arizona Supreme Court in *Arizona State Highway Department v. Chun, et al.*, 91 Ariz. 317, 372 P. 2d 324 (1962) :

“* * * The view sustained by the great majority of the cases is that an owner of real property taken or damaged in eminent domain is not entitled to compensation for the costs of removal of personal property from the premises. * * *”

In adhering to this principle, the courts have suggested a variety of reasons for denying payment:

- a. Eminent domain being treated as a sale between a willing buyer and seller, the buyer is not expected to pay for the removal costs of the seller's personal property;
- b. Removal costs and damage are remote, conjectural, and speculative;
- c. The statutes on eminent domain do not recognize such reimbursement.

As to the first specification, this court has oft-stated the basic test utilized in a proceeding to condemn property is that price which a willing buyer would pay for the parcel, and that price for which a willing seller would sell the property, neither being under the obligation to buy or sell, and both being reasonably informed as to the market. *State of Utah v. Noble*, 6 U. 2d 40, 305 P. 2d 495 (1957); *Southern Pacific Company v. Arthur*, 10 U. 2d 306, 352 P. 2d 693 (1960). In determining what that price is to be,

it is safe to say that in the normal course of events, neither buyer nor seller would anticipate paying or receiving the expenses that the seller would incur in removing his personal property from the premises. The rationale of this fact was acknowledged by the Minnesota Court in *In Re Assessment for Widening Third Street in St. Paul*, 176 Minn. 389, 223 N. W. 458:

“Appellant further claims that it is entitled to recover the expense of removing from the building. Appellant owns the building and stands in the position of seller. The city stands in the position of a buyer. Their relations are analogous to those between private parties where one is selling and the other buying. Where the owner sells to a private party, he removes from the property at his own expense. Where property is condemned the owner receives its fair value, and the decided weight of authority is that he is not entitled to an additional allowance for the expense of removing therefrom.”

The cornerstone of the eminent domain proceeding involves the appraisal of real property placed to the public use together with the assessment of damages to severed or non-contiguous real property remaining to the condemnee. 78-34-10 (1), (2) and (3), U. C. A. 1953. Historically, as well as statutorily, the legitimate objectives of the trial are to appraise real property interests, not to award the landowner a sum for removing and relocating his chattels. In the case of *LaMesa v. Tweed and Bambrell Planning Mill*, 304 P. 2d 803 (Cal. 1956), recovery for removal and relocation of personal property from the condemned area was refused, the California Court saying:

*"The cost of removing personal property is not a compensable item in a condemnation proceeding. Central Pac. R. Co. v. Pearson, 35 Cal. 247, 263; County of Los Angeles v. Signal Realty Company, 86 Cal. App. 704, 710, et seq., 261 Pac. 536. * * **
 The cost of removing or relocating such equipment is not reasonably related to its value as a part of the premises involved. Such a cost is not a compensable item recoverable as a part of the award for land taken or on account of severance damage.
** * * "*

See also *People of California v. Auman, et al.*, 220 P. 2d 569 (Cal. 1950).

As to the second specification above mentioned, testimony bearing upon any costs to remove and relocate personal property, by its inherent nature, is so speculative and conjectural that it should not, as a matter of law, be received. If such were admissible, the court would have to determine what a reasonable cost would be. In some circumstances, the expense might consist of removing the chattels to the contiguous property remaining to the owner; by the same mark, the owner could undoubtedly show that in order to utilize the property in substantially the same manner as before, it would be necessary to relocate it at a point more remote and distant. In cases of a total taking, the recovery could equal the cost of removing the property several miles from the right-of-way area, to the next county, or even to another state. The obscure and speculative features of this type of damage required the Missouri Supreme Court in *St. Louis City v. St. Louis R. R. Co.*, 266 Mo. 694, 182 S. W. 750, to reject the admission of such

evidence on the ground that there was no objective method to produce a uniform result. That court held:

“At first glance it is to be conceded that there exists a difficulty in finding a reason for not compensating the owner of personal chattels who is compelled to remove them for his expense in so removing them to a point at least beyond the edge of the right of way. It is equally clear, on the other hand, that no logical reason can be found for compensating him for the expense of removal beyond such point. This is so, for the reason A might desire to move his chattels only into the next adjoining house, while B might desire to have his taken several blocks or even several miles, and C on the other hand, his business being broken up, might desire to remove his goods to some other place or city.”

The Missouri court went on to say that the traditional concept of willing buyer and willing seller was the paramount consideration and that removal costs were not compensable:

“Viewed as a forced purchase by the public for the public good, as a damage action is, in the last analysis, the latter consideration seems of great weight, for if he whose land is condemned had voluntarily sold his land to a private purchaser, ordinarily, no thought would occur to either court or parties, absent agreement to that end, that the seller should be compensated by the buyer for the removal from the sold premises of mere personal goods and chattels.”

The Supreme Court of the United States has made its position known on the question. In *U. S. v. Petty Motor*

Motor Company, 327 U. S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946), the Federal Government sought to condemn only a leasehold interest. The condemnee alleged that it ought to have its costs for removal and relocation of personal property. Mr. Justice Reed, for the court, stated:

“We think the sounder rule under the federal statutes is to treat the condemnation of all interests in a leasehold *like the condemnation of all interests in the fee. In neither situation should evidence of the cost of removal or relocation be admitted.*”

As to the third specification, the statutes of this jurisdiction, particularly those dealing with eminent domain (Title 78, Chapter 34, Section 1, et seq.) are silent on appellants' claim for compensation. In stereotyped fashion, appellants cite the “damage clause” of Article I, Section 22, Utah Constitution, as their standard for recouping relocation and removal costs. The quick and proper response to this argument is that this Court has held that the Article I, Section 22 “damage clause” has reference only to that injury which was *actionable at the common law*. *State of Utah v. Fourth District Court*, 94 Utah 384, 78 P. 2d 502 (1937). It becomes, therefore, sufficient to say that costs, expenses and damage for removal and relocation of personal property from the condemned premises were not actionable nor compensable at the common law. *State of New York v. Bodner Industries*, 187 N. Y. S. 2d 359 (1959); *Korengold v. City of Minneapolis*, 95 N. W. 2d 112 (Minn. 1959); 29 C. J. S., Eminent Domain, Sec. 162.

In *Ballantyne Company v. City of Omaha*, 173 Neb. 229, 113 N. W. 2d 486 (1962), the municipal authority sought to condemn the interest of lessee. The Constitution of Nebraska set forth a similar type of "damage clause" as maintained in Article I, Section 22, Utah Constitution. It was held therein that in absence of specific statute to the contrary, compensation cannot be recovered for relocation and removal costs proximately caused by condemnation.

A suit was instituted in *Lucas v. Carney*, 167 Ohio 416, 149 N. E. 2d 238 (1958) to recover for damages sustained to personal property caused by the construction of a public improvement on neighboring property; in addition, the prayer included a claim for costs in removing and relocating the chattels. In dismissing the suit, the Ohio court declared:

"Cases are legion to the effect that a taking under the power of eminent domain does not include the personal property lying on the premises taken but not affixed thereto, and that damages for injury to such personal property or the expense of removing it from the premises taken is not a proper element of compensation. The reason for this rule is that in an appropriation proceeding the specific property taken is designated and all other property is excluded, so that one may have compensation only for the property taken and for any damage to the residue. * * *

(b) *Such costs and damage constitute an indirect claim against the State of Utah.*

That the claim of appellants for removal and relocation costs of personal property is disassociated with the evaluation proceeding in eminent domain cannot be controverted. Necessarily, the conduct of the trial is directed toward the landed interests of the owner solely. Appellants' claim should be accorded similar treatment as any other complaint asserted against the State of Utah, the proper forum therefor being the State Board of Examiners. Article VII, Section 13, Utah Constitution; *Wood v. Budge*, 13 U. 2d 359, 374 P. 2d 516 (1962).

The proffer made by the property owner for reimbursement was an attempt to do by indirect means what this court, in a host of decisions, has said cannot be done directly. *State of Utah v. Sine*, 13 U. 2d 65, 368 P. 2d 585 (1962); *Fairclough v. State Road Commission*, 10 U. 2d 417, 354 P. 2d 105 (1960). District Judge Faux recognized that governmental immunity was a defense to the claim when he stated at the trial:

“* * * With respect to defendants' contention that compensation should be allowed for the expense of removing personal property from the parcel of ground sought to be condemned, the court takes the view that in so doing defendants are seeking damages other than that allowed by the condemnation statute *and to allow it would in effect be permitting defendants to sue the state without the state's consent.* * * *” (Emphasis ours.)

Accordingly, the appeal of appellants should be denied.

POINT II.

APPELLANTS FAILED TO TAKE EXCEPTION TO INSTRUCTIONS OF THE COURT NOS. 15 AND 16.

(a) *The landowners are, therefore, barred from raising objections to those instructions at the appellate level.*

Appellants, at page 12 of their brief, predicate their appeal upon objection to Instructions 13 through 16, inclusive, given by the Court to the jury. At the trial, exceptions were taken by counsel for the respective parties subsequent to the retirement of the jury. Objections were registered by counsel for the landowners only to Instructions 13 and 14, the same appearing at pages 395 and 396 of the transcript, as follows:

“Mr. Barker: Your Honor, my exception is only with respect to my opinion that *Instructions 13 and 14* tend to convey to the jury the negative point of view, only as to the propositions that the property owners have no interest in the continued flow of traffic or any particular flow of traffic by the property whereas my instruction indicated that the *landowner does have a right* to reasonable access *to the traffic* on roads abutting his property and that the reasonableness shall be determined with reference to the requirements of the highway to be constructed and the uses to which defendants’ property may be employed. My position is that it is too

negative with regard to this point and fails to include the positive aspect that the landowner does have a right of ingress and egress in a reasonable manner *as to all parts of his property*.

“That is all I have, Your Honor. * * *”

The failure of appellants to make known their objections to Instructions 15 and 16 at the trial level is fatal to their effort to now raise them as an issue on appeal, for the Rules of this Court require that an exception be taken before the trial judge. Rule 51, U. R. C. P., dealing with instructions to juries, provides in part:

“* * * No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. * * *”

The decisions are practically without number in this state in their pronouncement that unless an exception is taken to an instruction at the trial, an appeal may not be thereafter founded on that point. *State v. Anderson*, 75 Utah 496, 286 Pac. 645; *State v. Zimmerman*, 78 Utah 126, 1 P. 2d 962; *State v. Hines*, 6 U. 2d 126, 307 P. 2d 887 (1957). The policy underlying Rule 51 and the decisional trend is that the trial judge should be informed of his error so that he might take steps to cure the mistake prior to the return of the verdict. *Marks v. Tompkins*, 7 Utah 421, 27 Pac. 6.

Although Rule 51 provides that the appellate court

may waive the mandatory obligation resting on each party in the interests of justice, *McCall v. Kendrick*, 2 U. 2d 364, 274 P. 2d 962 (1954), the facts in the case at bar do not warrant such consideration.

POINT III.

INSTRUCTIONS OF THE COURT, NOS. 13 AND 14, PROPERLY SUBMITTED THE ISSUES OF ACCESS-CONTROL TO THE JURY.

(a) A property owner, whose tract abuts upon a public highway facility, has only the right of reasonable ingress and egress under the circumstances.

From the Statement of Facts, it is apparent that in conjunction with the widening of the public highway on 21st South Street, the public agency, acting within the province of the police power, established various traffic control and regulatory devices to facilitate the movement of traffic. For example, concrete median-strips were constructed separating east-west movement, left-hand stall lanes were built (see attached exhibit), and ingress and egress to and from contiguous tracts were defined at specific points. As a necessary corollary, the stream of traffic on 21st South Street, as such affected the property of appellants, was re-routed and limited.

Instruction No. 13 of the lower Court cautioned the triers of fact in their assessment of damages due to diversion or denial of traffic:

“You are instructed that a landowner whose property fronts upon a public highway facility has no right to the flow of traffic along his frontage nor to the continued flow of traffic which might have been formerly enjoyed.

“Consequently, in your deliberations, you shall not assess any compensation to the defendants by reason of the diversion or denial of any traffic flowing in front of the defendants’ property along 2100 South Street prior to the construction of the new highway improvement.”

To begin with, it is a cardinal rule of law in this country that a property owner has no right to the flow of traffic or traffic movement and that such may be diverted, altered or taken away without payment of any compensation therefor. *Winn v. United States*, 272 F. 2d 282 (9th Cir. 1959); *State of Oregon v. Ralston*, 359 P. 2d 529 (Ore. 1961). The Utah Supreme Court first spoke on the issue in *State Road Commission v. Rozzelle, et ux.*, 101 Utah 464, 120 P. 2d 276 (1941). It was therein said that the condemnee is not entitled to recover for loss of traffic by his property. The principle was succinctly stated in the recent case of *Weber Basin Water Conservancy District v. Hislop*, 12 U. 2d 64, 362 P. 2d 580 (1961), wherein a unanimous court, writing through Callister, J., said:

“* * * Appellant’s argument assumes that a landowner has a property right in the flow of traffic on a highway adjacent to his property. *This*

is not so. The owner of land abutting on a street or highway has no property or other vested right in the flow of traffic on that street or highway and is not entitled to compensation when that flow of traffic is diminished as a result of eminent domain proceedings. * * *”

To the same effect is *State of California v. Ayon*, 54 Cal. 2d 217, 352 P. 2d 519 (1960).

Secondly, the imposition of median strips to serve as traffic-separators and having the corresponding effect of eliminating left turns and promoting one-way vehicular movement is a prerogative of the police power of the sovereign and as an attribute of that authority, any damages flowing from such regulation are non-compensable. *Springville Banking Company v. Burton, et al.*, 10 U. 2d 100, 349 P. 2d 157 (1960); *Rose v. State of California*, 19 Cal. 2d 713, 123 P. 2d 505 (1942); *Walker v. State of Washington*, 48 Wash. 2d 587, 295 P. 2d 328 (1956). The policy on which this rule is fastened is enunciated in *Springville Banking Company v. Burton*, *supra*.

Instruction No. 13 is not only a precise account of an abstract rule, but it was also seasoned with existing circumstances in the case.

In capsulary form, Instruction No. 14 advises the jury that the easement of access, appurtenant to the property of the landowner, is that of reasonable ingress and egress under the circumstances, and to the general system of public highways rather than a specific highway (see R. 69). From the appellants' brief, it is difficult to determine

the nature of their objection to Instruction No. 14; in the lower Court, counsel for appellants urged that a right was guaranteed to the landowner to traffic proceeding in a westerly direction on 2100 South Street (Tr. 392). Before this Court, it is said (App. Br., p. 12) that Instruction No. 14, in effect, advised that "appellants had no right of access to 2100 South Street, the denial of which appellants could be compensated" and that "their rights were *in common with the public at large*." In taking their exceptions, the landowners objected to Instruction No. 14 as being "too negative" and on the ground "that the landowner does have a right of ingress and egress in a reasonable manner *as to all parts of his property* (Tr. 396). To crystalize these arguments as they relate to the power of the State of Utah to regulate access from a highway to abutting properties, some analysis of the access right, itself, is apropos.

One of the incorporeal hereditaments recognized as an attribute to real property is the right to gain ingress and egress thereto. Once the easement of access arises, it is conceded that such may not be destroyed or obliterated without the payment of compensation. *Hague v. Juab County Mill and Elevator Company*, 37 Utah 290, 107 Pac. 249 (1910). It is quite another matter, however, to say that a landowner, whose property abuts upon a public highway facility, maintains an unfettered and indelible right to full access at all points along his frontage; in this regard, respondent submits that society has insured the abutter no such right.

This court has committed itself to the rule that a landowner has only the right to adequate and reasonable ingress and egress to the public highway, that the right of access does not extend to all parts fronting on the highway facility and that such easement is the subject of reasonable regulation by the governmental authority. In *Basinger v. Standard Furniture Co.*, 118 Utah 121, 220 P. 2d 117 (1950), it was held:

“* * * The right of access to the highway, however, is in the nature of a special easement, which exists as a right of ownership of abutting land, and is a substantial property right which may not be taken away or impaired without just compensation, *and is subject only to reasonable regulation.* * * *” (Emphasis ours.)

Justice Wolfe, by his concurring opinion in *State Road Commission v. Rozzelle*, 101 Utah 464, 120 P. 2d 276 (1941), affirmed the authority of the public agency to regulate access:

“* * * Any losses resulting from *unreasonably cutting off their own access* to their property or unreasonably interfering with their light and air given by reason of their abutting on a public highway are compensable. * * *”

The authority of the State Road Commission to raise and develop limited-access highways rests with legislative enactment. Title 27, Chapter 9, Section 1, et seq., U. C. A. (1953), empowers the Commission to “plan, designate, establish, improve and maintain and provide limited-access facilities” and to improve existing highways for such use. The char-

acter with which the access-design is endowed is of no significance in passing upon the question of reasonableness, for the effect of conventional city curbing, double lines painted on the shoulder of a street and a steel fence are parallel.

The courts of other jurisdictions have also recognized only the right to reasonable access. In *Smith v. State Highway Commission*, 185 Kan. 445, 346 P. 2d 259 (1959), the public authority condemned access rights of the landowner; although the Kansas court said that the prayer in the Commission's complaint required it to take *all* access, the guarantee of full and unlimited access to the abutter was denied:

“While the entire access of an abutting property owner on an existing highway may not be cut off, *generally an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway.* The use of the streets and highways may be regulated and restricted by the public authority in the exercise of the police power to the extent necessary to provide for and promote the safety, peace, health, morals and general welfare of the people. It is subject to such reasonable and impartial regulations adopted pursuant to this power as are calculated to secure to the general public the largest practical benefit from the enjoyment of the easement, and to provide for their safety while using it.”

If the regulation is determined to result in an unreasonable restriction and is not in harmony with the public good, the payment of compensation should be then forthcoming. In *State Highway Commission v. Smith*, 248 Iowa 869, 82

N. W. 2d 755 (1957), Tract A (commercial) had 216 feet and Tract B (residential) had 228 feet of uninterrupted access and frontage; upon construction of a limited-access highway, A was left with two openings of 34 feet, and B was given one opening at 18 feet. The Iowa court said that the claimant's easement of access did not extend to all points on the highway and that the *question of whether the access afforded was reasonable was one of fact*. Under the circumstances in *Smith*, the court said that access remaining to Tract A was reasonable, but the impairment to B was unreasonable, requiring the payment of compensation.

To determine whether the access-control in the case at bar was reasonable, the interests of the public, together with that of the landowner, must be weighed. The issue is one that is properly presented to the trier of fact.

(b) *The finding of the jury (that remaining access was reasonable under the circumstances) was supported by the great weight of testimony.*

An abundance of testimony was elicited at the trial pertaining not only to the public purpose to be accomplished by access-regulation, but the effect that such limitation might have upon the remaining properties of the landowner. The testimony of highway engineers and research analysts was uncontroverted that public safety and uninhibited movement of traffic would be enhanced by access control as designed. The effect that such limitation would have upon the remaining property of appellants, however,

was disputed by the respective parties. It was admitted by appellants that prior to construction of the highway improvement, the condemnees had constructed, themselves, a chain link fence (7 feet high) across their entire frontage on 2100 South Street, with only a 16-foot opening for ingress and egress. It was the opinion of the evaluation witness for the property owners that the controlled access device would substantially effect the use of the remaining tract. On the other hand, the evaluation witnesses for the State, Solomon, Cook and Johns, testified uniformly that the highest and best use of the remaining property was industrial utilization, that such was the zoning regulation applicable to the property, and that under such use, an industrial park could be developed, predicated on access design, without any increment of loss. Upon the close of the evidence, the issue of reasonableness was correctly submitted by the lower Court to the jury through special interrogatory. It is rudimentary in this State that a finding of fact, on matters at law, will not be disturbed on appeal unless such is determined to be clearly against the manifest weight of the evidence. *Seybold v. Union Pac. R. Co.*, 121 Utah 61, 239 P. 2d 174.

Against the finding on the special interrogatory, appellants contend in their brief that the access-regulation constituted a "substantial impairment", and was "unreasonable." Such statements are wholly argumentative; upon review by this court, the verdict of the fact finder is entitled to a presumption of validity. *McCollum v. Clothier*, 121 Utah 311, 241 P. 2d 468; *Seybold v. Union Pacific R. Co.*, *supra*.

The instructions of the lower Court accurately advised the jury of the rights and of the power residing with the public agency to divert traffic movement and to regulate access.

CONCLUSION

The claim of appellants for costs, expenses and damages incident to removal and relocation of personal property from the condemned tract are not recoverable in eminent domain; the determination of the lower Court denying such claim should be affirmed.

An owner of property whose land abuts upon a public highway has neither the right to the flow of traffic along his frontage nor the protection of unlimited access at all points fronting upon the facility. The respondent, by the police power, may divert and reroute traffic and control access to and from the abutter's tract without the payment of compensation, unless the latter is found to be unreasonable. The directions to the jury, incorporating these principles, were correctly outlined in Instructions 13 and 14 of the lower Court. Appellants have no standing to urge error in Instructions 15 and 16. Accordingly, the judgment should be upheld.

Respectfully submitted,

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